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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ASOCIACION DE RECLAMANTES, AMINTA ZARATE, LUIS RIOJAS, FELIPA FLORES BENAVIDEZ, MARIA AGUIRRE DE SCHULTZ, NIEVES GUERRERO CHAPA, SANTOS ZARATE PRIETO,

Petitioners,

v.

THE UNITED MEXICAN STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT J. SALAZAR
RUSSELL E. VIGIL
650 Lawrence Street Center
1380 Lawrence Street
Denver, Colorado 80204

MITCHELL ROGOVIN *
GEORGE T. FRAMPTON, JR.
VICKI C. JACKSON
ROGOVIN, HUGE & LENZNER
A Professional Corporation
1730 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 466-6464

JESS J. ARAUJO
DIMARCO & ARAUJO
A Professional
Law Corporation
1015 North Broadway
Santa Ana, California 92701

Of Counsel:
JOAQUIN G. AVILA
MORRIS J. BALLER
MEXICAN-AMERICAN LEGAL DEFENSE & EDUCATION FUND
28 Geary Street
San Francisco, California 94108

* Counsel of Record

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QUESTIONS PRESENTED

Under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(4), jurisdiction exists against foreign sovereigns in cases involving "rights in immovable property situated in the United States." The questions presented are:

1. Whether, where Mexico (a) asserted formal claims on behalf of Petitioners, most of whom were American citizens, against the United States seeking the return of certain identified lands located in Texas, or compensation therefor, (b) then, by Treaty, released the United States from any obligation to return said lands or compensate Petitioners for their value, and (c) at the same time, concededly assumed itself the obligation to compensate Petitioners for their lost Texas lands, does jurisdiction exist under § 1605(a)(4) in that "rights in immovable property situated in the United States are in issue"?

2. Whether the Court of Appeals' conclusion that, as a result of the 1941 claims settlement treaty between Mexico and the United States, Petitioners' rights to compensation for their Texas lands are no longer "rights in immovable property" is in conflict with this Court's decisions in *Bachman v. Lawson*, 109 U.S. 659 (1884), and *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193 (1828), which establish that claims settlement treaties neither create nor extinguish property rights but merely change the remedy available to the injured party?

3. Whether the Court of Appeals' conclusion that Petitioners' claims now have a mere "historical" relationship to United States land, outside the scope of the "immovable property" exception to sovereign immunity, is correct, when Petitioners' right to relief would turn on their proof of title in their ancestors to real property located in Texas and on the valuation of such property?

4. Whether, in order to avoid difficult constitutional questions, the 1941 claims settlement treaty must be interpreted, not as "extinguishing" Petitioners' right to compensation for their Texas lands, but merely as transferring or assigning the obligation to satisfy said claims from the United States to Mexico?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals, *Asociacion de Reclamantes et al. v. The United Mexican States*, is reported at 735 F.2d 1517 (D.C. Cir. 1984), and is set forth in Appendix A. The opinion of the United States District Court for the District of Columbia is reported at 561 F. Supp. 1190 (D.D.C. 1983) and is set forth in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1984. The petition for rehearing was denied on August 28, 1984. On October 23, 1984, Chief Justice

Burger extended the time within which to file a petition for a writ of certiorari to and including December 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY, CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

This case involves the jurisdictional provisions of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1605 (1976); the Treaty On Final Settlement Of Certain Claims, 56 Stat. 1347, T.S. No. 980 (Nov. 19, 1941) (hereinafter the "1941 Treaty") between Mexico and the United States; and the Fifth Amendment to the U.S. Constitution. These are reproduced in Appendix E. The principal provision is § 1605(a)(4) which provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case in which . . . rights in immovable property situated in the United States are in issue.

STATEMENT OF THE CASE

Petitioners are predominantly American citizens of Mexican descent.[1] They seek to recover just compensation for 12 million acres of land in Texas wrongfully taken from their families by the United States and the State of Texas. Petitioners now proceed against Mexico, as, under the 1941 Treaty, Mexico assumed the obligation of the United States to provide them compensation for such land.

As the complaint below alleged, Petitioners' ancestors acquired title to their Texas land prior to 1848 under land grants made by Spain and Mexico. Amended Complaint, ¶ 9, Pet. App. 49a-50a (hereinafter "Complaint"). Under the Treaty of Guadalupe Hidalgo, 9 Stat. 922, T.S.

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[1] Four of the individual-named Petitioners are American citizens and residents; two are citizens and residents of Mexico. Petitioners sought to represent a class of over two thousand claimants, most of whom are American citizens residing in the United States. *See* Amended Complaint, ¶ 8(a), Pet. App. 47a. The Asociacion de

No. 207 (Feb. 2, 1848), these private land grants were to receive the protection and respect of the United States. Beginning in the late nineteenth century, however, Petitioners' ancestors were wrongfully driven off their land in Texas by a combination of private and governmental action. *Id.* ¶ 12, Pet. App. 50a.

In the early 1920's, the Government of Mexico began actively asserting the claims of the Petitioners' families, most of whom were American citizens,[2] against the United States Government. In 1923, the United States and Mexico concluded a treaty which created a General Claims Commission to resolve all claims of private citizens asserted by one nation against the other and to provide "just and adequate compensation for [the] losses and damages" suffered by the claimants. General Claims Treaty, art. V, 43 Stat. 1730, T.S. No. 678 (Sept. 8, 1923) (hereinafter "1923 Treaty"), Pet. App. 84a; Complaint, ¶¶ 16-18, Pet. App. 51a. Under the procedures of the 1923 Treaty,[3] Mexico asserted against the United States, on behalf of Petitioners' families, 433 specific land grant claims which it valued in 1925 at an exact dollar figure exceeding $193 million. Complaint, ¶ 19, Pet. App. 51a-52a. Each of these claims identified the exact tract of

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Reclamantes is a Texas nonprofit corporation established to assist Petitioners and other claimants in pursuing their claims against Mexico. It has no affiliates, parent companies or subsidiaries. See Sup. Ct. R. 28.1.

[2] Under Article VIII of the Treaty of Guadalupe Hidalgo, Mexicans such as Petitioners' ancestors who remained in Texas after the war automatically became U.S. citizens one year after the Treaty's effective date. *See* Complaint, ¶¶ 19, 21-22, Pet. App. 51a-53a (alleging U.S. citizenship of families at time Mexico represented them in proceedings against U.S.).

[3] Under the General Claims Protocol of 1934, 49 Stat. 3531, E.A.S. No. 57 (hereinafter "1934 Protocol"), this Commission was replaced by an appraisal procedure; the Protocol provided, however, that the 1923 Treaty itself would otherwise remain "fully effective and binding." 1934 Protocol, § 6(f).

land at issue and placed an appraised value on it.[4] In each claim, Mexico alleged that one of Petitioners' families was the "legitimate owner" of land in Texas and explicitly sought to enforce their rights to title to and possession of the land by "restoration" of the land itself or, alternatively, by the "payment of its value." Complaint, Ex. B., Pet. App. 74a-75a. But by 1940, none of Petitioners' claims had been decided. *Id.*, ¶¶ 19, 23-25, Pet. App. 52a-53a.

Thereafter, the two countries entered into the 1941 Treaty, which was intended to finally settle the liability of each government on claims asserted against it. Pet. App. 88a-93a; Complaint, ¶ 27, Pet. App. 53a. By releasing the United States from liability on Petitioners' claims, Mexico gained a set-off regarding the claims which were being pressed against it by the United States.[5] As the Court of Appeals noted, the 1941 Treaty resulted in the assumption by each government of the obligation to pay the claims which it had presented to the Claims Commission, including the 433 land grant claims at issue here. 735 F.2d at 1519, Pet. App. 3a.

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[4] A complete listing of these 433 claims, showing the original grantee, the claimants, their residence, and the location and value of the tract, was prepared by Mexico in 1932 and attached as Exhibit C to the Amended Complaint. For reasons of space, this Exhibit was not duplicated.

[5] The 1923 Treaty directed the Claims Commission to value the claims on each side and, thereafter, to the extent that the aggregate claims advanced by one nation exceeded the claims of the other, the difference would be paid sovereign to sovereign. 1923 Treaty, art. IX, Pet. App. 85a. Each government was then to pay the claims of those whom it had represented. The 1941 Treaty and ancillary agreements provided for a net payment by Mexico to the United States of $40 million, and various other concessions and benefits flowing back *to* Mexico from the United States. *Cf.* Dawson and Weston, *"Prompt, Adequate And Effective": A Universal Standard Of Compensation?*, 30 Fordham L. Rev. 727, 740-41 (1962) (Mexico was released from responsibility for more than $350 million in American claims).

After signing the Treaty, Mexico, by Presidential Decree,[6] acknowledged its obligation to satisfy Petitioners' claims. Following this Presidential Decree, Mexico repeatedly reaffirmed in writing its obligation to Petitioners and their families. Complaint, ¶¶ 31-33, Pet. App. 55a. Indeed, in 1980, the head of the Legal Advisor's Office of the Mexican Foreign Ministry assured Petitioners that Mexico would honor its obligations and that the decision had been made by the "highest authorities" of the Mexican government to pay the claims promptly. *Id.* ¶ 47, Pet. App. 57a. As the District Court noted in its opinion, "[a]s recently as January 29, 1982, the Attorney General of Mexico acknowledged the claims." 561 F. Supp. at 1195, Pet. App. 25a.[7] Although the United States paid its claimants within seven years, payment has never been made by Mexico notwithstanding its conceded obligation. Complaint, ¶¶ 28, 56, Pet. App. 54a, 59a.

On September 18, 1981, Petitioners sued Mexico under the FSIA, relying on § 1330, and § 1605(a)(4) as their major jurisdictional base. On Mexico's motion to dismiss, the District Court was of the view that jurisdiction under 28 U.S.C. § 1605(a)(4) would exist if the case involved "an action . . . to recover money derivative of real property rights." 561 F. Supp. at 1196, Pet. App. 28a. However, it denied jurisdiction because it viewed the Petitioners' compensation rights as mere "intangible property rights created through the diplomatic process," *id.*, since, it believed, Petitioners had not pled that they or their

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[6] Amended Complaint, ¶ 30, Ex. E (Decree of President Manuel Avila Camacho, December 9, 1941, published in El Diario Oficial, December 31, 1941, Vol. CXXIX, § 5, pp. 1 and 2) (hereinafter "1941 Decree"), Pet. App. 54a-55a.

[7] Indeed, at oral argument in the District Court, counsel for Mexico conceded: "Nobody argues here that there is not some kind of obligation. The Government of Mexico has acknowledged that too frequently to make that a point of debate." Tr. of Oral Arg. at 65 (Jan. 13, 1983).

predecessors held a title interest in the land prior to 1923.[8] Pet. App. 29a.

The Court of Appeals rejected the District Court's analysis. It agreed with Petitioners that the District Court's characterization of Petitioners' claims as mere "intangible property rights" was erroneous, because an express allegation of title had in fact appeared in an Exhibit to the Complaint. Pet. App. 6a n.4. However, while the District Court had agreed with Petitioners that jurisdiction under § 1605(a)(4) extended to "an action . . . to recover money derivative of real property rights," Pet. App. 28a, the Court of Appeals characterized this view as "expansive" and rejected it. Pet. App. 6a-10a.

The Court of Appeals, while conceding that immediately prior to the 1941 Treaty the Petitioners' "predecessors in interest possessed a claim to title and possession," Pet. App. 11a-12a, nevertheless concluded that jurisdiction was lacking under § 1605(a)(4) because in some way Petitioners' rights had been extinguished by that Treaty. Believing that Congress intended a "narrow" construction of § 1605(a)(4), it analogized the scope of the "immovable property" exception to sover-

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[8] Plaintiffs had also argued that jurisdiction existed under the "tort" provision of § 1605(a)(5). The District Court held it unavailable under the "discretionary function" exception. The Court of Appeals did not reach the discretionary function issue; it held that all elements of the tort must occur within the United States; because the Court of Appeals viewed Mexico's failure to pay as having occurred in Mexico, it found jurisdiction lacking. Mexico also raised the "act-of-state," and statute of limitations in defense. The District Court found the act-of-state doctrine applicable; the Court of Appeals did not reach that issue in view of its jurisdictional holding. While neither Court below addressed the limitations issue in their opinions, at oral argument the District Court had stated its view that Mexico's apparent acknowledgments of its obligation made the limitations defense unavailable on the present record. Tr. of Oral Arg. at 31 (Jan. 13, 1983).

eign immunity to the "local action" rule, to conclude that § 1605(a)(4) is "limited to disputes directly implicating property interests or rights to possession." Pet. App. 9a. It discounted the legislative history's reference to adjudication of "rent . . . and similar matters" on the basis that they frequently, though not always, "involve issues of title and possession," as well as disputes over money. Pet. App. 10a n.5.

The lynchpin of the Court of Appeals' analysis, however, is its conclusion that Petitioners' "property claims . . . were extinguished by the 1941 Treaty." Pet. App. 12a. Although recognizing the conceded obligation of Mexico to compensate the Petitioners, and the fact that "whether appellants' predecessors in interest ever in fact held title to these lands would . . . be relevant to their entitlement to compensation from Mexico," it concluded that these issues were of purely "historical interest" to the United States. Pet. App. 12a. In the Court's view, while Mexico may have "obligated itself under its own laws" to pay Petitioners, adjudication would not affect present property interests or possessory rights in the United States and thus jurisdiction was lacking. Pet. App. 11a.

Judge Edwards' separate concurrence emphasized that he regarded the case to be "highly unique," and that he did not agree that, "in a contemporary setting," the property rights of aliens in this country could be extinguished without compensation or consideration through a treaty with a foreign sovereign. Pet. App. 15a.[9]

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[9] Judge Edwards' reference to Petitioners as "aliens" is mirrored in the majority opinion as well. *See* Pet. App. 11a. ("Mexico . . . obligated itself under its own law to its nationals"). This is perplexing since the Complaint clearly pled the U.S. citizenship of the claimants both at the time of the assertion of their claims and at present. Moreover, by 1849, under the terms of the Treaty of Guadalupe Hidalgo, those Mexicans still residing in Texas became U.S. citizens, and thus were U.S. citizens at the time their land was taken from them. See note 2, *supra*. While under *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), their citizenship is

REASONS FOR GRANTING THE PETITION

The Court of Appeals' grudging interpretation of the jurisdictional provisions of the Foreign Sovereign Immunities Act has deprived thousands of American citizens of Mexican descent of an American judicial forum to adjudicate claims against Mexico for compensation for the loss of land located in Texas, an obligation Mexico has admitted to exist. The ruling below is completely contrary to the expressed purpose of the Congress in enacting the statute, and to any fair reading of the jurisdiction it established over claims involving "rights in immovable property situated in the United States." Moreover, the ruling below is founded upon the court's conclusion that a claims settlement treaty entered into between Mexico and the United States *extinguished all existing property rights* of the private claimants. This ruling is in conflict with this Court's decisions in *Bachman v. Lawson*, 109 U.S. 659 (1884), and *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193 (1828), and manifests a confusion concerning the effect of claims settlement treaties on the rights of private claimants that should be settled by this Court.[10]

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irrelevant to the Court's jurisdiction, the Court of Appeals' misunderstanding of this point may have colored its perception of the interest of the United States in exercising jurisdiction here. *Cf. United States v. Belmont*, 301 U.S. 324, 332 (1937) (distinguishing between foreign nationals and American citizens with respect to U.S. public policy that private property not be taken without just compensation in context of expropriations by foreign sovereign).

[10] Paradoxically, while the Court of Appeals rejected jurisdiction because, in its view, the 1941 Treaty had *extinguished* Petitioners' "property claims," the District Court had rejected jurisdiction under § 1605(a)(4) because it believed Petitioners' claims had been *created* by the diplomatic process which culminated with the 1941 Treaty. *See* pp. 5-7, *supra*. The confusion of the lower courts is perhaps attributable to the fact that this Court has, in recent years, not fully addressed the effect of claims settlement treaties on private property, although the decision in *Dames & Moore v. Regan*, 453 U.S. 654 (1981) approached this terrain.

I. THE COURT OF APPEALS' INTERPRETATION OF THE 1941 TREATY CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

The Court of Appeals agreed that, prior to the 1941 Treaty, "[a]ppellants' predecessors in interest possessed a claim to title and possession, undoubtedly a 'right in immovable property' at the time." Pet. App. 11a-12a. Yet, the Court held that the Petitioners' present claims do not involve "rights in immovable property" within the scope of § 1605(a)(4) because, in its view, the property rights of Petitioners' predecessors were "extinguished" by the 1941 Treaty. *Id.* This holding is directly contrary to the longstanding rule established by this Court that settlement treaties, aimed at compensating damage caused by the violation of property rights, neither create new rights nor extinguish preexisting rights, but merely transfer between sovereigns the obligation to satisfy the preexisting rights. *See, e.g., Bachman v. Lawson*, 109 U.S. 659 (1884); *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193 (1828); *see also Great Western Insurance Co. v. United States*, 112 U.S. 193, 198 (1884); *Atocha v. United States*, 8 Ct. Cl. 427 (1872), *mandamus denied*, 84 U.S. (17 Wall.) 439 (1873); *Meade v. United States*, 2 Ct. Cl. 224 (1866), *aff'd on other grounds*, 76 U.S. (9 Wall.) 691 (1869).[11]

Indeed, the reasoning used by the Court of Appeals to find jurisdiction lacking under § 1605(a)(4) is virtually identical to that decisively rejected by this Court in *Comegys v. Vasse*. There the dispositive question was whether a payment under a claims settlement treaty was a donation from the government or an indemnification for the violation of a preexisting property right. The

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[11] *See also* 2 C. Butler, *The Treaty-Making Power Of The United States* §§ 443-44 (1902); Note, *Constitutional Issues In The Settlement Of Property Claims Against Foreign Sovereigns*, 2 Hastings Const. L. Q. 1091, 1104-15 (1975).

argument that the payment was a donation (an argument rejected by the Court), was stated as follows:

> Had the parties, whose property was condemned by irrevocable sentence, any right? What they obtain after that condemnation is not founded in right, but in policy between the nations providing compensation to individuals who have lost property by sentences which are thought unjust. The grounds of relief before the commissioners are, the want of any redress in municipal courts. Whatever the individual obtains is not on the ground of right, or private property, but of hardship and injustice. Though this, therefore, is not a case of pure donation, as of a gift without anything in the nature of a consideration, yet, for the purpose of being contrasted with property or right, it is a donation, not a restoration of a former right, but from a new fund belonging to an independent authority.

26 U.S. (1 Pet.) at 216 (quoting *Campbell v. Mullet*, 2 Swanston 551).

In *response* to this view, Justice Story, speaking for the Court, stated:

> Such is the language of the learned judge, and we cannot say that the reasoning is at all satisfactory . . . . *The right to compensation in the eye of the treaty, was just as perfect, though the remedy was merely by petition, as the right to compensation for an illegal conversion of property in a municipal court of justice. . . . It recognized an existing right to compensation* in the aggrieved parties, and did not, in the remotest degree, turn upon the notion of a donation or gratuity.

26 U.S. (1 Pet.) at 216-17 (emphasis added). *Comegys* establishes that settlement treaties "recognize" preexisting property rights and provide a remedy for violations of those rights.

The rule established in *Comegys* is no isolated statement; it has been adhered to by this Court in sub-

sequent cases. Thus, in *Bachman v. Lawson*, 109 U.S. 659 (1884), plaintiffs sued for compensation under a retainer agreement by which they were to assist the defendant in securing redress from Great Britain for damage suffered as a result of the seizure of a vessel. After the agreement was signed, the 1871 Treaty of Washington was entered into and provided for the establishment of a claims tribunal for the evaluation and payment of such claims. Subsequently, the defendant retained different counsel to assist it before the claims tribunal and refused to pay plaintiffs on the ground that their agreement "relat[ed] solely to the claim which existed at its date; that that claim was extinguished by the operation of the treaty of Washington." 109 U.S. at 662. The Supreme Court decisively rejected this argument:

> 'The right to indemnity for an unjust capture . . . *is a right attached to the ownership of the property itself.* . . . The right to compensation, in the eye of the treaty, was just as perfect, though the remedy was merely by petition, as the right to compensation for an illegal conversion of property, in a municipal court of justice. . . . It recognized an existing right to compensation. . . .' [quoting *Comegys.*] *The claim established before the court of commissioners of Alabama claims was manifestly the very claim contemplated by the agreement in suit.*

Id. at 662 (emphasis added). Decisions of the lower court have similarly viewed the effect of claims settlement treaties on private rights.[12]

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[12] In *Atocha v. United States*, 8 Ct. Cl. 427 (1872), *mandamus denied*, 84 U.S. (17 Wall.) 439 (1873), the United States had argued that no interest should be allowed on an award by the Court of Claims to Atocha, an American citizen who had been wrongfully expelled from Mexico in 1845, since at the time, interest was not allowable on claims against the United States. 2 C. Butler, *The Treaty-Making Power of the United States* § 444 at 306 n.8 (1902). Under the 1848 Treaty of Guadalupe Hidalgo, which settled numer-

In short, a claims settlement treaty such as the 1941 Treaty does not create new rights nor does it extinguish preexisting rights. Rather, it transfers between the sovereigns, through an express or implied assumption, the obligation to satisfy the preexisting, underlying claims.[13] Thus, the fact that the 1941 Treaty altered the Petitioners' remedy from the return of the land or payment of compensation by the United States, to the payment of compensation by Mexico, does not change the nature of their rights, which derive from immovable property, and therefore, are within the purview of § 1605(a)(4).

Yet the Court of Appeals, while acknowledging the core holding of *Comegys* that " 'payment [of a claim] under a claims settlement treaty . . . [is properly viewed as] an indemnification for the violation of a preexisting property right,' " Pet. App. 12a, (quoting Appellants' Brief at 15), viewed this "indemnification" as a separate claim involving different rights:

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ous private claims between Mexico and the United States, Mexico had been fully discharged from liability on Atocha's claim for damages, and the Court of Claims so held. 8 Ct. Cl. at 437. But it nonetheless rejected the argument that, as a result of the 1848 treaty, his claim should now be regarded merely as a claim against the United States. Recognizing the continuity of Atocha's claim, the court stated "[t]hough the suit is nominally against the United States, it is in reality against the government of Mexico . . . ." *Id.* at 438. Interest was awarded from the date of his wrongful expulsion, in spite of the fact that the award would be paid by the United States. *Id.* at 438-39.

[13] *See e.g., Great Western Ins. Co. v. United States*, 112 U.S. 193, 199 (1884) ("[*Ex Parte Atocha*] was a case in which, by the express terms of the treaty, the United States had assumed the debt of Mexico to Atocha and others of his class. The present is a case in which such assumption is implied from the circumstances of the treaty and the receipt of the money."); *Meade v. United States*, 2 Ct. Cl. 224, 276 (1866), *aff'd on other grounds*, 76 U.S. (9 Wall.) 691 (1869) ("By . . . treaty . . . the claimant's property is taken for and appropriated to the public use. Spain is released; all her obligation to the claimant is cancelled. By the same instrument it is transferred to, and assumed by, the United States.").

> Obviously, to say that the second claim goes to the holder of the first is not to say that it is identical with the first—either in amount or in its general character as a "real estate" claim—much less in its character as a "right in immovable property" for the specific purpose of the FSIA.

Pet. App. 13a (footnote omitted).

The Court of Appeals' statement that "the second claim . . . is not . . . identical with the first" conflicts with the rule established by *Comegys* and *Bachman* concerning the *rights* affected by claims settlement treaties. In *Comegys*, Justice Story, writing for the Court, stated: "The *right to indemnity . . . is a right attached to the ownership of the property itself.* . . . [The treaty] recognized *an existing right* to compensation. . . ." 26 U.S. (1 Pet.) at 215-17 (emphasis added). In *Bachman*, the Court stated that "The claim established . . . *was manifestly the very claim*" which existed prior to the settlement treaty. 109 U.S. at 662 (emphasis added). In short, there is no "second" claim of right as the Court of Appeals assumed; rather, there is merely *one* claim, and more important, one right, "attached to the property," with the responsibility for payment of such claim transferred between sovereigns.[14]

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[14] The Court of Appeals also sought to distinguish *Comegys*

> in that the claim had already been adjudicated by an international commission and found to be meritorious *before* it was espoused. Thus, the holding does not even establish that an espoused but unadjudicated claim such as existed here necessarily leaves *any* post-settlement rights in the original claimant.

Pet. App. 13a n.6. The distinction drawn by the Court of Appeals between "already . . . adjudicated" but unsatisfied claims and "unadjudicated claim[s]" is without relevance. Petitioners know of no authority, and the Court of Appeals cited none, for the proposition that only "already . . . adjudicated" claims survive a claims settlement treaty. In any event, the distinction made by the Court of Appeals is inconsistent with *Bachman*, which adhered to the rule established by *Comegys*, although it dealt not with an "already . . . adjudicated" claim but with a claim which was un-

To support its conclusion that the 1941 Treaty extinguished Petitioners' rights, the Court of Appeals discusses the "principle . . . [that] a sovereign possesses the absolute power to assert the private claims of its nationals against another sovereign." Pet. App. 10a. It goes on to state that "[f]inal settlement between the sovereigns 'wipes out the underlying private debt,'" relying on Professor Henkin's treatise. Pet. App. 11a. It is clear from the context, however, that Professor Henkin was describing nothing more than what Petitioners concede occurred here: As a result of the 1941 Treaty, Petitioners' "recourse under domestic law" against the original obligors—here the United States and the State of Texas—was, indeed, intended to be wiped out. L. Henkin, *Foreign Affairs and the Constitution* 262 (1972). That the obligation of one sovereign debtor was eliminated, however, does not mean that the *right* of the claimant has likewise been extinguished.[15] Indeed, *Bachman* and

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adjudicated prior to the Treaty of Washington. In this sense, the claim asserted in *Bachman* is identical to the claims asserted by Petitioners and Petitioners' case should be governed by the *Comegys* rule. The Court of Appeals' failure even to mention *Bachman*, despite Petitioners' strong reliance on it below, undercuts its effort to limit the rule established by *Comegys*.

[15] Indeed, the recent trend, noted by Professor Henkin, is that the underlying right may be vindicated by a remedy under the Fifth Amendment. Henkin, *supra*, 259-66. Henkin specifically noted the decision in *Cities Service Co. v. McGrath*, 342 U.S. 330 (1952), which lends "support to the view that making someone pay twice for some overriding foreign relations purpose, while not constitutionally impermissible, *constitutes a taking for a public use that requires just compensation; and, perhaps, if no compensation is forthcoming, the original taking becomes unlawful as a deprivation of property without due process of law.*" *Id.* at 261-62 (emphasis supplied). Moreover, as Henkin implies, if compensation is constitutionally required when an international agreement "reinstat[e]s claims against Americans that have been paid," then, so, too, should it be required when international agreements "nullif[y] claims by Americans that have not been paid." *Id.* at 262. *See Gray v. United States*, 21 Ct. Cl. 340 (1886) (Americans whose claims against France were relinquished by the United States in

Comegys demonstrate that the change in remedy worked by a claims settlement treaty does not extinguish the underlying private right.[16]

In *Comegys* and *Bachman*, the Supreme Court simply applied the traditional rule that the bundle of rights which a person holds over real or personal property includes not only the right to use, enjoy and possess such property, but to be compensated for it if wrongfully taken from him. "[A]ttached to the ownership of the property itself" is "[t]he right to indemnity." *Comegys v. Vasse*,

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the Treaty of 1800 had a right to compensation for their losses, though no remedy was then available); *Holbrook v. United States*, 21 Ct. Cl. 434 (1886); *Cushing v. United States*, 22 Ct. Cl. 1 (1886). More recently, in *Dames & Moore v. Regan*, 453 U.S. 654, 688-89 (1981), this Court specifically noted that it was not "appropriate at the present time to address petitioner's contention that the suspension of claims . . . would constitute a taking of property in violation of the Fifth Amendment to the United States Constitution in the absence of just compensation." *Id.* at 689. This Court held, however, that the "takings" claim could appropriately be brought before the U.S. Court of Claims pursuant to the Tucker Act, thus plainly indicating that the claim was neither frivolous nor foreclosed by prior decisions. Moreover, Justice Powell, in a separate opinion, made explicit his view that "The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts." *Id.* at 691.

[16] In the Court of Appeals' view, the 1941 Treaty, by providing Petitioners with a new remedy (*i.e.*, monetary compensation from Mexico rather than the return of land or monetary compensation from the United States) somehow simultaneously extinguished Petitioners' preexisting "rights in immovable property" situated in Texas. This view, reduced to its essence, holds that the "remedy" alters or qualifies the nature of the underlying property right. Yet, this view has been rejected by this Court in the context of a just compensation claim. *See Jacobs v. United States*, 290 U.S. 13, 16 (1933). In *Jacobs*, commenting on the nature of the suit, the Court observed:

> The suits were based on the right to recover just compensation for property taken by the United States for public use in the

26 U.S. (1 Pet.) at 216. Thus, the Court of Appeals' reading of *Comegys* and *Bachman* is not only in conflict with these decisions but represents a departure from traditional common law conceptions as to the origin and nature of property rights. The basic and uncontroverted fact is that Petitioners' families were the owners of 12 million acres of land in Texas. As an essential incident of ownership, Petitioners' families were entitled to be compensated for any wrongful taking of their land, a right neither created nor extinguished by the 1941 Treaty. *Cf. United States v. Percheman*, 32 U.S. 51 (1833) (Marshall, C.J.) (rights of property remain undisturbed even in cases of conquest).

The Court of Appeals' search for the origin and nature of Petitioners' land compensation claims against Mexico need not have proceeded further than the very Texas lands for which Petitioners seek compensation. It is abundantly clear that all rights emanating from such lands, including the right to compensation for its taking, are rights in immovable property. See Part III, *infra*. The Court of Appeals' reliance on the 1941 Treaty to justify its contrary holding is in conflict with this Court's prior decisions, and thus suggests the need for review by this Court.

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exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. *The form of the remedy did not qualify the right.*

290 U.S. at 16 (emphasis added).

II. THE COURT OF APPEALS' INTERPRETATION OF THE 1941 TREATY TO DEFEAT JURISDICTION UNDER SECTION 1605(a)(4) OF THE FOREIGN SOVEREIGN IMMUNITIES ACT RAISES SERIOUS CONSTITUTIONAL ISSUES.

The circumstances surrounding the Petitioners' claims admittedly are unique.[17] It is indeed rare that a constitutional obligation under United States law to provide just compensation to American citizens for lands taken from them in the United States is transferred or assigned to a foreign sovereign by treaty or executive agreement. Yet, under the 1941 Treaty, this is precisely what occurred.[18]

Forty-three years have passed since the 1941 Treaty was signed. Unfortunately, the "Mexican sense of obligation" of which Mexico's counsel spoke in the District Court proceedings has not resulted in any fulfillment of that obligation to compensate the Petitioners. See note 18, *supra*. Prior to filing this action, the Petitioners made every good faith effort possible to secure compensation from Mexico through normal governmental channels. *See* Complaint ¶¶ 35-56, Pet. App. 55a-59a (allegations of extensive efforts to secure compensation from Mexico). This action followed when those efforts proved futile. It represents, in the Petitioners' view, the only remaining effort they can make to hold Mexico accounta-

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[17] *See Trustees Of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 644-45 (1819) ("although a particular and rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule. . . . It is not enough to say, that this particular case was not in the mind of the Convention when the article was framed. . . .").

[18] Counsel for Mexico stated at oral argument in the District Court that: "We, really, here have two kinds of plaintiffs. We have two named Mexican representatives. . . . We also have U.S. citizens. . . . [T]he United States Government . . . relegat[ed] *its own citizens* to the Mexican sense of obligation." Tr. Oral Arg. at 24, 26 (Jan. 13, 1983) (emphasis added).

ble for payment of their claims, as the 1941 Treaty contemplated.

The Court of Appeals' holding that the 1941 Treaty "extinguished" Petitioners' property rights, will, if sustained, place the Petitioners in the position of having a conceded right to compensation for lands taken from them in Texas, but no effective remedy against Mexico to enforce that right. Under such circumstances, the question left open by this Court in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), must be faced: If the remedy provided by a claims settlement treaty (here, payment by Mexico), is inadequate—as blatantly appears to be the case in view of Mexico's forty-three year failure to make payment—are not Petitioners entitled to reopen the issues the 1941 Treaty was intended to lay to rest and proceed directly against the United States to obtain the just compensation to which they are entitled under the U.S. Constitution? Decisions of the lower courts have expressly contemplated that the Constitution may require such a result, where a remedy envisioned by a claims settlement agreement proves to be ineffective.[19]

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[19] *See Seery v. United States*, 127 F. Supp. 601 (Ct. Cl. 1955). In *Seery* the Court posed the issue as follows: "[I]t is evident that . . . the plaintiff's property was taken under such circumstances that she was entitled under the Fifth Amendment . . . to be paid just compensation. We must now decide whether the [claims settlement] agreement [with Austria] took that right from her." *Id.* at 606. The United States argued that the settlement agreement had destroyed the plaintiff's right to compensation and, hence, there was no claim against it upon which her suit could be maintained. The Court, cognizant of the grave constitutional issue posed by the Government's argument, concluded that, "[i]t would be indeed incongruous" to interpret the settlement agreement as "destroy[ing] the Constitutional right of a citizen." 127 F. Supp. at 607. Thus, the Court held that her right, as an American citizen, against the United States was not extinguished by the claims settlement agreement. As a result, at least where the foreign sovereign had not provided compensation to the plaintiff, the United States could be called upon to make good its constitutional obligation to provide just compensation. *Id.* at 606-07. This squaring of a claims settlement agree-

The Court of Appeals' interpretation of the 1941 Treaty raises serious constitutional questions. Not only may these Petitioners have a constitutional basis for proceeding directly against the United States (in contravention of the intent of the 1941 Treaty), but other claimants represented by the United States itself in other international proceedings may also have Fifth Amendment claims against the United States. If claims settlement treaties completely "extinguish" preexisting rights —rather than transferring the obligation to satisfy such rights between sovereigns—then it is difficult to avoid the conclusion that a "taking" has occurred for which just compensation must be provided under the Fifth Amendment. This result, obviously unforeseen by the Court of Appeals in a holding tailored to avoid judicial consideration of the historically unique claims of Petitioners, would have significant implications for the conduct of American foreign policy.

In sum, the Court of Appeals' holding, while barring the Petitioners from seeking relief against Mexico, necessarily opens up a new avenue of redress for them directly against the United States in the Court of Claims.[20] Of course, claims settlement agreements are intended to avoid this result. A proper construction of the 1941

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ment with the Fifth Amendment right of a citizen to just compensation avoided the serious constitutional issue inherent in the Government's argument that the plaintiff's claims had been totally destroyed by the settlement agreement.

[20] The Court of Appeals' construction of § 1605(a)(4) results in the total denial of access to a judicial forum against Mexico and raises due process concerns, since there is serious doubt as to whether Congress can constitutionally deny American citizens a judicial forum to resolve disputes which involve the taking of U.S. real property rights. *See generally* Brilmayer & Underhill, *Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws*, 69 Va. L. Rev. 819 (1983); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953).

Treaty, to recognize that Petitioners' preexisting rights survived but must now be satisfied by Mexico, is not only consistent with *Comegys* and *Bachman* but also avoids these difficult constitutional questions.[21]

III. THE COURT OF APPEALS' CONSTRUCTION OF SECTION 1605(a)(4) IS INCONSISTENT WITH THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THIS IMPORTANT JURISDICTIONAL STATUTE.

While the principal basis for the Court of Appeals' conclusion was its view that the 1941 Treaty had "extinguished" any preexisting property rights of the Petitioners, it also implied more generally that land com-

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[21] This Court has recently reiterated that statutes should be construed to avoid constitutional questions, and in particular, that courts "should decline to construe [statutes] in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the takings clause." *United States v. Security Industrial Bank*, 459 U.S. 70, 82 (1982) (quoting *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979)). In *Security Industrial Bank*, construing a provision of the Bankruptcy Reform Act retroactively would have resulted in the complete destruction of a lien interest in household goods. This Court, sensitive to the taking that would result if the Act were thus applied, construed it to apply prospectively, thus avoiding the Fifth Amendment issue. Here, Petitioners' right to compensation for their land is one of the rights emanating from their ownership of the land. The Court of Appeals' decision that petitioners' rights were extinguished by the 1941 Treaty, and that there was no jurisdiction under the FSIA, is neither required nor even supported by the relevant statutory materials nor by this Court's prior decisions. A recognition that the 1941 Treaty merely limited the remedy, and did not extinguish Petitioners' preexisting land compensation rights, would permit the lower courts to exercise jurisdiction in this case, and proceed to an examination of the merits. *Cf. Seery v. United States*, 127 F. Supp. 601, 607 (Ct. Cl. 1955) (recognition that defeating jurisdiction on basis of interpretation of settlement agreement as extinguishing property rights would effectively "destroy the Constitutional right of a citizen" and raise serious constitutional issue).

pensation claims—that is, money claims for the value of real property—were simply not within the scope of the "immovable property" clause. Its interpretation of that clause, and of the FSIA's legislative history, is completely erroneous, and unsupported by the very authorities it cites.

The plain language of the immovable property clause of the FSIA clearly extends jurisdiction to any case in which "rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). The FSIA's legislative history, though sparse, indicates that Congress intended to confer jurisdiction to "adjudicate questions of ownership, *rent*, servitudes *and similar matters*." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 20, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6619 (hereinafter "House Report") (emphasis added). Petitioners had argued below that the 1941 Treaty did not change the "immovable" character of the bundle of rights they derived from their Texas lands, including the right to compensation for such lands, but simply affected their remedy by transferring the obligation to provide just compensation for their lost Texas lands from the United States to Mexico. In support, Petitioners noted that in both common law and civil law jurisdictions, the right to compensation for real property is treated as a real or immovable property right. Thus, their compensation claims for their Texas lands fell squarely within the purview of § 1605(a)(4) which reaches any case in which "rights in immovable property . . . are in issue." Petitioners further argued that since a "rent" claim for the temporary use of real property was intended to be within the jurisdiction established by § 1605(a)(4), then surely a compensation claim for the permanent loss of land itself, a "similar matter," was also included.

The Court of Appeals began its analysis of the reach of § 1605(a)(4), however, not with the words of the

statute, nor even with the legislative history directly bearing on the immovable property clause of § 1605(a)(4). Rather, it began with the proposition that the pre-FSIA "restrictive theory" of immunity would supply the answer, and moved from there to the "local action" rule, concluding that only cases "directly implicating" property interests in the United States were intended to be included. Apart from the fact that this analysis begs the very question presented—whether Petitioners' rights to compensation are real property rights—it is even more fundamentally flawed.

Congress' overriding purpose in enacting the FSIA was to assure that immunity determinations would "henceforth" be made in conformity with its express legal standards. *See* 28 U.S.C. § 1602. It was to remedy the *lack* of "comprehensive," governing standards concerning the sovereign immunity defense that Congress spent several years crafting the precise language of the FSIA. House Report at 7, 1976 U.S. Code Cong. & Ad. News 6605; *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487-88 (1982) (restrictive theory standards neither "clear nor uniformly applied"). Congress specifically directed that "[c]laims of foreign states to immunity should henceforth be decided . . . in conformity with the principles set forth in" the FSIA. 28 U.S.C. § 1602. Yet, the Court of Appeals eschewed the express legal standards of the FSIA, sought to evade the clear import of the relevant legislative history concerning the intended scope of the immovable property clause, and completely ignored the primary source for defining the nature and character of Petitioners' property rights—state law. The contorted and narrow reading the Court of Appeals gave § 1605(a)(4) is reminiscent of the unpredictable immunity decisions rendered by the State Department. This approach, which the FSIA was intended to supplant, should not be sanctioned by this Court.

A. Under Applicable State Law And The FSIA's Legislative History, A Right To Compensation For Real Property Is A "Right In Immovable Property."

The Court of Appeals opened its analysis by rejecting Petitioners' reliance on state law to give meaning to the plain statutory terms used by Congress in § 1605(a)(4). *See* Pet. App. 7a (eschews effort to obtain "artificial consensus" on meaning of "immovable property"). Yet, the general rule in this country is that the nature of property rights are determined by reference to state law. In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), the Court stated:

> Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims or entitlement to those benefits.

The distinction between "immovable" property rights and other property rights is not a major feature of federal law, and it thus seems evident that Congress intended the term used in the statute to be construed primarily by reference to state law.[22]

The "immovable" character of Petitioners' land compensation claims is amply demonstrated by resort to either common or civil law precedents. It has long been recognized in the common law that, in situations like the present, where land rights have been taken, a compensation fund created after extinguishment of title retains the character of real or immovable property. As a leading commentator summarized:

> A fund derived from a payment by the city for lands taken for school purposes for the benefit of

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[22] In passing the FSIA, Congress expressly stated that "[t]he bill is not intended to affect the substantive law of liability." House Report at 12, 1976 U.S. Code Cong. & Ad. News 6610.

> unknown owners must be treated as real estate. Also, insurance money realized from the destruction of buildings on devised real estate will be treated as real property. Upon a conveyance of land by the executor of a testator in pursuance of an option given by the testator during his lifetime, the proceeds of the sale pass as real estate. The proceeds of the sale of real estate, made by decree of court in a partition suit, retain the character of real estate for the purposes of distribution. *Likewise, where there is a compulsory conversion of real estate, as in the exercise of the power of eminent domain, and without the consent or against the will of the owner of the fee, the compensation awarded will be treated as real estate until the owner, being sui juris, accepts it as personal property.*

1 G. Thompson, *Commentaries on the Modern Law of Real Property* § 19 at 83 (1980 Replacement) (emphasis added and citations omitted).[23]

Looking to civil law authorities, where the phrase "immovable property" is more commonly found,[24] it is equally clear that a right to compensation for land would be treated as a "right in immovable property." *See Clarke v. Brecheen*, 387 So. 2d 1297, 1301 (La. Ct. App. 1980) (rights in immovable property include "two basic

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[23] Under Texas law in particular, it appears that claims to compensation for the taking of land would be regarded as real property rights, subject, for example, to the laws of succession governing the transmission of real property. *See Toledo Soc'y for Crippled Children v. Hickok*, 152 Tex. 578, 261 S.W.2d 692 (1953), *cert. denied*, 347 U.S. 936 (1954) (law of situs of land to which rights relate determines nature of succession rights); *Humble Oil & Refining Co. v. Copeland*, 398 F.2d 364, 366 (4th Cir. 1968) (under Texas law right to future royalty payments is interest in land).

[24] *See 2 Tudor City Place Assoc. v. Libyan Arab Republic Mission*, 121 Misc. 2d 945, 470 N.Y.S.2d 301, 304 (N.Y. City Civ. Ct. 1983) ("immovable property" in § 1605(a)(4) used in the civil law sense).

rights—the right to possess, use and enjoy the property *and the right to receive the fruits produced by the property.*") (emphasis added). Indeed, under civil law, "rights in immovable property" include a broad range of usufructuary or beneficial interests derived from land, *e.g.* leases, licenses, rents, mineral rights, easements, royalties and profits. *See, e.g.*, La. Civ. Code Ann. art. 535 (West 1980).

The conclusion suggested by state law is reinforced by the legislative history of the FSIA. As noted above, Congress did express its view that "questions of . . . ownership, *rent*, servitudes, *and similar matters*" were within the jurisdictional grant for actions involving "rights in immovable property."[25] If a mere rent claim for the temporary use of land suffices for jurisdiction under § 1605(a)(4), then *a fortiori* Petitioners' claims for payment for the permanent loss of their land suffice as well.[26]

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[25] *See County Bd. v. German Democratic Republic*, No. 78-293-A (E.D. Va. Sept. 6, 1978) *reprinted in* 17 *Int'l Legal Mat'ls* 1404-06 (1978) (§ 1605(a)(4) jurisdiction found where county sought to collect real property taxes and assert tax lien on apartment building owned by the German Democratic Republic). Petitioners' case is even stronger than *German Democratic Republic* since there the taxes due merely related to the land while here the funds due replace the land.

[26] The Court of Appeals, without any support in the language of the FSIA or its legislative history, attempted to limit the scope of § 1605(a)(4) to only those money claims that were for rent. Thus, it stated: "It is true that an action for rent does not always call into question either ownership or possessory rights. . . . However, the related local action rule has been applied to [some] rent suits. . . . [A]ctions for rent frequently involve issues of title and possession, *and have been given distinctive jurisdictional treatment for that reason.*" 735 F.2d at 1522 n.5, Pet. App. 9a n.5. To begin with, the legislative history's reference to "rent . . . *and similar matters*" is inconsistent with the Court of Appeals' apparent view that land compensation claims are not within the scope of § 1605(a)(4). Moreover, there is absolutely no indication in the

As these authorities demonstrate, both the express language used in the FSIA (as interpreted by state courts) and the language used by Congress in the legislative history pertaining to § 1605(a)(4), indicate that the District Court was correct in concluding that this section extends to cases to "recover money derivative of real property rights." 561 F. Supp. at 1196, Pet. App. 28a. The Court of Appeals' contrary conclusion was erroneous, and unsupported by its own rationale.[27]

B. The Rationale Of The "Local Action Rule" Supports The Exercise Of Jurisdiction By An American Court In This Case.

The Court of Appeals asserted that the "restrictive theory" of immunity relating to real property actions arises from and should thus be measured by the "local

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legislative history that Congress intended "distinctive jurisdictional treatment" for rent claims. Indeed, the Court noted that "[t]he parties have not cited, and we have not found, any cases *either before or after the FSIA* dealing with the application of sovereign immunity to actions for rent against foreign sovereigns." Pet. App. 9a n.5. This fact further undercuts the Court's assertion that Congress intended "distinctive jurisdictional treatment" for such claims.

[27] The Court of Appeals' narrow construction of § 1605(a)(4) also conflicts with the general rule established by this Court that a jurisdictional statute like the FSIA should be construed in accordance with its express terms unless the statute's legislative history reflects a clear intention by Congress to limit its scope. *Bread Political Action Comm. v. Fed. Election Comm'n*, 455 U.S. 577, 580-81 (1982) ("Absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive. . . . Jurisdictional statutes are to be construed with precision and with fidelity to the terms by which Congress has expressed its wishes. . . . In short, the plain language of [the statute] controls its construction, at least in the absence of 'clear evidence' . . . of a 'clearly expressed legislative intention to the contrary. . . .'" (quoting *Palmore v. United States*, 411 U.S. 389, 396 (1973); *United States v. Apfelbaum*, 445 U.S. 115, 121 (1980); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

action" rule. Yet this rule, nowhere referred to in the FSIA or in its legislative history, is not only of dubious relevance in interpreting the "immovable property" clause, but it in fact supports Petitioners' view of that clause.

According to the court below, the "local action rule" makes the "locality's power exclusive and deprives other courts of jurisdiction to settle questions involving real estate." Pet. App. 8a. The foundation of this rule, as well as of the "traditional exception [from sovereign immunity] limited to questions involving property interests or possession," according to the Court of Appeals, is two-fold: first, "[a] territorial sovereign has a primeval interest in resolving all disputes over use or right to use of real property within its own domain," and second, "[c]ourts are simply not well equipped to decide property interests or rights to possession with regard to land outside their jurisdiction, particularly land located in a foreign nation." Pet. App. 8a.

To the extent that the "local action" rule is even relevant,[28] its rationale supports Petitioners' view that their claims against Mexico are properly resolved by American courts. These claims inherently involve issues of title to lands in Texas, and successorship rights under Texas law to the compensation owed for such lands. Applying the inheritance laws of Texas concerning real property interests, and determining the title to and value of Texas land, are precisely the kinds of issues peculiarly within an American court's competence.

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[28] Some of the cases cited by the court below involved venue. *See, e.g., Pace v. Ott*, 189 Okla. 230, 115 P.2d 253 (1941). Congress' enactment of special venue provisions which permit the filing of any action, even one involving "rights in immovable property" relating to Texas lands, in the United States District Court for the District of Columbia, 28 U.S.C. § 1391(f)(4), eliminated any applicability of the local action venue rule to actions under the FSIA against foreign sovereigns. Even were the local action rule applicable, however, it would simply require adjudication of the claims in Texas, but would not support a sovereign immunity defense.

C. Where It Is Necessary To Adjudicate Title Claims To Texas Land To Resolve The Merits Of A Dispute, The Express Language Of Section 1605(a)(4) Confers Jurisdiction.

Although the Court of Appeals recognized that "the issue whether appellants' predecessors . . . ever in fact held title to these lands would, presumably, be relevant to their entitlement to compensation from Mexico," Pet. App. 12a, it regarded such issues as "historical" only. Even though such questions of title would be "in issue" in the litigation, it evidently believed that this was not sufficient, and that some special determination of the nature of the rights asserted by Petitioners was required solely for the purpose of determining jurisdiction. *See* Pet. App. 7a, 13a. Petitioners know of no authority for this view, nor did the Court cite any.

Indeed, this view is squarely contrary to § 1605(a)(4), which provides jurisdiction in any case "in which . . . rights in immovable property . . . are *in issue*." (emphasis added). The clear mandate of this language is that the nature of the rights be determined by reference to their nature when they are "in issue" between the parties —that is, for purposes of resolving the merits of the dispute. As the court below recognized, the title of Petitioners' ancestors, as well as Petitioners' inheritance rights under Texas real property law, will plainly be "in issue." Such rights are clearly "rights in immovable property," under any theory.

More important, however, is the bedrock fact that Petitioners today are seeking compensation for the taking of their land in Texas. In codifying the defense of foreign sovereign immunity, Congress could not have intended to extend immunity to a foreign state that owes compensation to American citizens for a taking of their United States' land. Petitioners' rights to compensation are "rights in immovable property," under any applica-

ble authority. And the 1941 Treaty no more extinguished these "rights" than did the Treaty of Washington at issue in *Bachman* or the 1819 Treaty with Spain at issue in *Comegys*.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully submit that this Court should grant a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

ROBERT J. SALAZAR
RUSSELL E. VIGIL
650 Lawrence Street Center
1380 Lawrence Street
Denver, Colorado 80204

MITCHELL ROGOVIN *
GEORGE T. FRAMPTON, JR.
VICKI C. JACKSON
ROGOVIN, HUGE & LENZNER
A Professional Corporation
1730 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 466-6464

JESS J. ARAUJO
DIMARCO & ARAUJO
A Professional
Law Corporation
1015 North Broadway
Santa Ana, California 92701

* Counsel of Record

Of Counsel:
JOAQUIN G. AVILA
MORRIS J. BALLER
MEXICAN-AMERICAN LEGAL
DEFENSE & EDUCATION FUND
28 Geary Street
San Francisco, California 94108